IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2611 OF 2005

M/s.Royal Oil Field Private Limited, a Company incorporated under the Companies Act, 1956, having its Registered office at 101, Janaki Center, Off Veera Desai Road, Andheri (West) Mumbai .. Petitioner.

V/s.

1. The Union of India, (through the Ministry of Law, Justice and Company Affairs, Aayakar Bhawan, M.K. Road, Churchgate, Mumbai - 400 020.

2. The Commissioner of Customs, Jawahar Customs House, having his Office at Port Users Bldg., Sheva Taluka Uran, Dist Raigad

3. The Assistant Commissioner of Customs, Jawahar Customs House, having his Office at Port Users Building, Sheva, Taluka Uran, District Raigad. .. Respondents.

Mr.Madhur Baya, Advocate for the petitioner.

Mr.S.S. Pakale, Advocate with Mr.A.H. Gokhale for the respondents.

CORAM : V.C. DAGA &
J.P. DEVADHAR, JJ.

DATED : 5TH OCTOBER, 2005.

ORAL JUDGMENT (PER J.P. DEVADHAR, J.) :

1. Heard counsel on both sides.

2. Rule. Rule returnable forthwith. By consent of the parties, the petition is taken up for final hearing.

3. In the ordinary case, we would not have entertained the writ petition which challenges the show cause notice. However, the case of the petitioner is that the imports covered under the impugned show cause notice as well as the imports under an earlier show cause notice have been made pursuant to a registered contract and the earlier show cause notice issued by the Customs authorities for enhancing the invoice value has been quashed and set aside by the CESTAT and, therefore, the present show cause notice issued for enhancing the invoice value for the balance quantity of goods imported under the registered contract is also liable to be quashed and set aside. Since it is contended that the issue raised in the show cause notice is already adjudicated, we thought it fit to entertain the writ petition.

4. The case of the petitioner is that on February 25, 2002, it had entered into a contract with M/s.IMX Port National Trading Corporation,

Canada for import of 5000 Metric Tonnes of LDPE/HDPE/PP Mixed Plastic Granules / Powder (floor sweepings) at US Dollars 225 per Metric Tonne. The said contract was duly registered with the Assistant Commissioner of Customs, Nhava Sheva on February 28, 2002.

5. In terms of the registered contract, the foreign supplier despatched the contracted goods from time-to-time by various shipments. In respect of the initial consignments which arrived in May-June, 2002, the petitioner filed four bills of entry seeking clearance of the goods for home consumption. The Customs Authorities did not accept the invoice value and wanted to load the invoice value. Therefore, the petitioner filed Writ Petition No.3186 of 2002 in this Court. The said writ petition was disposed of by permitting clearance of the goods on the petitioner depositing 50% of the disputed duty and furnishing bank guarantee for the balance 50% of the disputed amount, with liberty to the Customs Authorities to adjudicate the matter in accordance with law.

6. Subsequent import of floor sweepings made by the petitioner during the period from July 1, 2002 to May 11, 2004 were also allowed provisional clearance

on the petitioners furnishing revenue deposit and bank guarantee as per the order passed in writ petition No.3186 of 2002.

7. In the meantime, in respect of the goods covered under the four bills of entry which were cleared under the orders of the Court in Writ Petition No.3186 of 2002, the Customs Authorities issued a show cause notice on July 11, 2002 calling upon the petitioner to show cause as to why the invoice value of US Dollar 225 should not be rejected and the goods be assessed at US Dollar 381.6 per Metric Tonne. The petitioner resisted the action of the Customs authorities and requested for acceptance of the invoice value.

8. On adjudication, the Assistant Commissioner of Customs, Nhava Sheva by his order dated April 3, 2004, rejected the contention of the petitioner and assessed the four bills of entry at US Dollar 288 per Metric Tonne as against US Dollar 225 per Metric Tonne shown in the invoice. Appeal filed by the petitioner against the said order was dismissed by the Commissioner of Customs (A) on October 30, 2003. Further, appeal filed by the petitioner was however, allowed by the CESTAT on December 10, 2004 and the Customs authorities were directed to accept the

invoice value at US Dollar 225 per Metric Tonne. It is not in dispute that the order passed by the tribunal on December 10, 2004 has been accepted by the revenue.

9. Thereafter, the Customs authorities have issued the impugned show cause notice dated March 1, 2005 calling upon the petitioner to show cause as to why the goods already cleared on provisional basis covered under the 45 bills of entry should not be assessed at US Dollar 325 per Metric Tonne on the basis of contemporaneous import. Challenging the aforesaid show cause notice, the present petition is filed.

10. Mr.Nankani, learned counsel appearing on behalf of the petitioner submitted that the impugned show cause notice is based on the very same grounds on which the earlier show cause notice dated July 11, 2002 was issued. Since the goods covered under both the show cause notices have been imported under the same registered contract dated February 25, 2002 and the earlier show cause notice for enhancing the invoice value is already quashed and set aside by the CESTAT, it is not open to the Customs authorities to issue show cause notice for enhancing the value of the goods imported under the registered contract

dated February 25, 2002 and, therefore, the impugned show cause notice is without jurisdiction. He submitted that under Section 129B (4) of the Customs Act, 1962 the order passed by the tribunal on a question relating to the valuation of the goods is final and binding on the Customs Department unless the same is stayed and set aside by the higher authorities. In the present case, the order passed by the CESTAT in respect of the part of the consignment has been accepted by the revenue and, therefore, it is not open to the respondents to issue a fresh show cause notice in respect of the balance consignment covered under 45 bills of entry cleared during the period from July 1, 2002 to May 11, 2004.

11. Mr.Pakale, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the customs authorities should be permitted to adjudicate upon the show cause notice which is impugned in the present petition. He submitted that if on adjudication the order is adverse to the petitioners, there is a statutory remedy of appeal provided under the Customs Act and, therefore, no orders be passed in the present petition. In support of his contention that the writ petition challenging the show cause notice should not be entertained, he relied upon the decisions of the

Apex Court in the case of **Union of India V/s.Bajaj Tempo Ltd. [94 E.L.T.285], Union of India V/s. Polar Marmo Agglomerates Ltd. [96 E.L.T.21], Union of India V/s. Hindalco Industries [153 E.L.T. 481 and Commissioner of Cus. & C.Ex. V/s. Charminar Nonwovens Ltd. [167 E.L.T. 372]**.

12. On the merits of the case, Mr.Pakale submitted that the invoice value of the goods covered under the 45 bills of entry were not the subject matter of the appeal before the Tribunal and, therefore, it cannot be said that the decision of the Tribunal dated December 10, 2004 is applicable to the goods covered under the show cause notice. He further submitted that as per the contract registered with the Customs, the supplier was to ship the goods within 12 months of the contract. However, imports under the 45 bills of entry have been made beyond the period of 12 months and, therefore, it cannot be said that the goods covered under the show cause notice were imported under the registered contract. Since the goods covered under the show cause notice have been imported beyond the validity period of the contract, the customs authorities have every reason to believe that the value of the goods covered under 45 bills of entry could be different from the registered contract. He submitted that out of 45

bills of entry, the supplier of goods in respect of 35 bills of entry are different and not the same supplier with whom the petitioner had entered into a contract on February 25, 2002. Accordingly, the counsel for the revenue submitted that the show cause notice must be permitted to be adjudicated in accordance with law.

13. Having heard counsel on both the sides, we are of the opinion that the contention of the petitioners that the the goods covered by CESTAT order dated December 10, 2004 and the goods covered under the 45 bills of entry which are subject matter of the impugned show cause notice dated March 1, 2005 have been imported pursuant to the registered contract dated February 25, 2002 may not be entirely correct, because, firstly, the names of the suppliers of goods in 35 bills of entry out of 45 bills of entry are different from the name of the supplier set out in the registered contract. Although, it is contended that the said suppliers have shipped the goods at the instance of the supplier mentioned in the contract, it is open to the Customs authorities to verify the same in the adjudication proceedings. Secondly, the contract between the petitioner and the foreign supplier dated February 25, 2002 was valid for 12 months from the date of the signing of the

contract whereas the goods covered under the impugned show cause notice have been imported much beyond the period set out in the contract. Therefore, it cannot be conclusively said that the goods referred to in the impugned show cause notice have been imported under the registered contract dated February 25, 2002. If the goods are not imported under the registered contract, then the decision of CESTAT dated December 10, 2004 which relates to the value of the goods imported under the registered contract dated February 25, 2002 cannot be applied ipso facto to the goods covered under the show cause notice in question. It would be open to the petitioner to establish during the adjudication proceedings that the goods in question have been imported under the registered contract and that the invoice value should be accepted. Thus, in our opinion, the contention of the petitioner that the goods must be considered to have been imported under the registered contract and without adjudication the invoice value should be accepted as per the decision of the CESTAT dated December 10, 2004 cannot be accepted.

14. However, it appears that the impugned show cause notice has been issued mechanically and without application of mind. The goods which are subject matter of the impugned show cause notice were allowed

clearance provisionally pending investigation on the petitioner furnishing revenue deposit and bank guarantee. On completion of investigation it is open to the revenue to pass the final assessment order either by accepting the invoice value or by rejecting the invoice value and loading the same on the basis of the evidence gathered during the investigation. Before rejecting the invoice value the revenue is obliged to issue show cause notice disclosing the reasons for rejecting the invoice value. In the present case, save and except making a bold statement that the customs officer intends to load the invoice value on the basis of contemporaneous imports, there is no material disclosed as to why the invoice value is not acceptable. Even in the additional affidavit-in- reply filed by Mr.Bharat Singh, Assistant Commissioner of Customs on August 30, 2005, it is stated that since the goods in question are not imported under the registered contract, the price of the imported goods could be different from the invoice value and, therefore, the show cause notice has been issued to reject the invoice value. Thus, it appears that by assuming that the goods are not imported under the registered contract dated February 25, 2002, the show cause notice to reject the invoice value has been issued merely on suspicion without there being any valid basis. If the show cause

notice is totally vague and does not disclose any material for rejecting the invoice value then such a show cause notice cannot be said to be validly issued. Various decisions relied upon by the counsel do not lay down any proposition of law that a show cause notice which is totally vague and does not disclose any material for rejecting the invoice value cannot be quashed and set aside in exercise of writ jurisdiction.

15. Accordingly, the impugned show cause notice dated March 1, 2005 which is totally vague and bereft of any particulars for rejecting the invoice value is quashed and set aside. The respondents are directed to finalise the assessment in respect of the goods covered under the 45 bills of entry which were cleared on provisional assessment basis in accordance with law. It is however, made clear that the quashing of the show cause notice dated March 1, 2005 will not preclude the department to issue fresh show cause notice for rejecting the invoice value before passing the final assessment order by disclosing the material, if any, for rejecting the invoice value. The Customs authorities are directed to finalise the assessment in respect of the goods covered under the 45 bills of entries as expeditiously as possible at any rate within a period of three months from today

16. Petition is disposed of in the above terms. Rule is made absolute in terms of prayer clause (a) with no order as to costs.

(V.C. DAGA, J.)

(J.P. DEVADHAR, J.)